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## Incorporating Issues of Sexual Orientation into a First Year Property Law Course: Relevance and Responsibility

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# INCORPORATING ISSUES OF SEXUAL ORIENTATION INTO A FIRST YEAR PROPERTY LAW COURSE: RELEVANCE AND RESPONSIBILITY

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## I. INTRODUCTION

In May 2007, Stephen Dunne learned that he would not be allowed to practice law in Massachusetts because he had failed the state's bar examination.<sup>1</sup> On June 25, 2007, Mr. Dunne filed a lawsuit in the United States District Court for the District of Massachusetts naming the Massachusetts Board of Bar Examiners and others as defendants.<sup>2</sup>

According to Mr. Dunne, he failed the exam because he refused to answer a question that would have compelled him "to write an affirmative response explicitly and implicitly accepting, supporting, and promoting homo-

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1. Complaint for Declaratory and Injunctive Relief and Damages at 3–4, *Dunne v. Mass Bd. of Bar Exam'rs*, No. 07-11166-DPW (D. Mass. June 25, 2007) [hereinafter *Complaint*].

2. *Id.* at 1.

sexual marriage [and] homosexual parenting.”<sup>3</sup> Mr. Dunne has stated that answering the question “would have violated his Irish Catholic beliefs.”<sup>4</sup>

The question that Mr. Dunne refused to answer involved Mary and Jane, a married couple, and their children, Philip and Charles.<sup>5</sup> Applicants were asked to sort out the rights of Mary and Jane, as individuals, regarding parenting, property, and otherwise, upon the termination of their marriage.<sup>6</sup> Mr. Dunne believed that his failure to answer the Mary and Jane question, motivated by his Catholic faith, prevented him from becoming a lawyer.<sup>7</sup>

Subsequently, Mr. Dunne filed a motion to dismiss his lawsuit<sup>8</sup> which was granted by the court.<sup>9</sup>

On January 3, 2008, Bay Windows, a New England newspaper serving the gay, lesbian, bisexual, and transgender communities, published a letter from Mr. Dunne.<sup>10</sup> In the letter, Mr. Dunne apologized to the gay community for being “an instrument of bigotry and prejudice.”<sup>11</sup>

3. *Id.*

4. Donna Goodison, *Bar-exam Flunker Quits Suit over Gay-Wed Question*, BOSTON HERALD, Sept. 8, 2007, at 8.

5. Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint at 2, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. July 30, 2007).

6. Mass. Bd. of Bar Exam’rs, Massachusetts Bar Examination ¶ 4 (Mar. 1, 2007), available at <http://www.mass.gov/bbe/essayquestionsfeb2007.pdf>.

7. Complaint, *supra* note 1, at 4.

8. Motion to Voluntarily Dismiss Complaint, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. Sept. 5, 2007).

9. Order of Dismissal, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. Oct. 9, 2007).

10. Laura Kiritsy, ‘I’m Embarrassed at What I Did,’ BAY WINDOWS, Jan. 3, 2008, available at <http://www.baywindows.com/index.php?ch=news&sc=gblt&sc3=&id=54304&pf=1>.

11. *Id.* The letter from Mr. Dunne, titled “Apology to Gay Community” reads:

I am writing this letter to apologize to the gay community for been [sic] an instrument of bigotry and prejudice. By filing a misguided federal lawsuit against the State of Massachusetts in respect to the legitimacy of same-sex marriage, I have regrettably perpetuated intolerance and animosity towards my fellow Americans. My religiously based discrimination of gay people was callous and diametrically opposed to America’s core principles of freedom and equality.

In hindsight, my opposition to same-sex marriage based on purely religious grounds was categorically and indisputably wrong. I am deeply sorry for the hurt that I have caused the gay community as a whole and I am particularly regretful of my actions towards those gay and lesbian friends that I befriended and studied alongside during my three years of law school. You are all wonderful people and loving parents and I am profoundly sorry for having insulted you and your families. Please accept this letter as a sincere apology for my lashing out as a result of failing the bar exam. The only correct answer is to stop demonizing gay people on the grounds of religion and embrace and love all members of the American family, regardless of sexual orientation.

At the end of the day, we are all fellow citizens, we are all equals, sharing the same hopes, troubles, and dreams. I hope you have room in your heart to accept my apology.

Not discounting Mr. Dunne's religious objections to the Mary and Jane question, perhaps he was also unable to answer the question because his first opportunity to think about and discuss the intersection of sexual orientation and the law was when he was taking the Massachusetts Bar Examination. If so, that is a shame. Legal issues involving sexual orientation are present throughout the traditional law school curriculum and should be covered in the appropriate courses. This essay addresses the way I incorporate such issues into my first year property law course, and encourage other professors to do the same.

During discussion of several of the topics included on the syllabus for my property law course, I ask the students to think about the ways in which certain seemingly neutral laws may have a disparate impact on individuals who are gay, lesbian or bisexual.<sup>12</sup> I do this in an attempt to provoke discussions about the intersection of property law and sexual orientation. Some years, the attempt has been incredibly successful. Students have visited my office and e-mailed me to tell me how much they appreciated the classes. Other years, my attempts have been less successful. Students have been reluctant to participate in the discussions, and I have been unable to persuade them to do so beyond a perfunctory level.

The classes, however, are always rewarding for me. Sometimes the classes are rewarding because the students' reluctance to engage forces me to think of different ways to encourage class participation. Other times, the students' questions and comments propel me to think about the issues in ways I have not contemplated. Being forced to "think on my feet" or do additional research to address the concerns of students helps to keep the material fresh.

As this essay will show, there are several intersections between property law and sexual orientation. Accordingly, part II of the essay demonstrates how issues of sexual orientation can be incorporated into a property law course. Part III of the essay raises concerns a professor must consider when determining how to incorporate these issues into her course. Part IV of the essay explains the importance of including such issues in the law school classroom. Finally, the essay concludes.

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Merry Christmas and Happy Holidays.

*Id.*

12. During the course, I also ask students to think about the ways in which property laws intersect with issues of race, class, and gender. This paper, in keeping with the theme of the Goodwin lecture series, focuses on sexual orientation issues. I have not asked my students to think about the ways that property laws intersect with the issues of gender identity and gender expression. However, as a result of writing this piece, I have realized that it is a topic that I need to include. See *infra* note 30 for how I intend to do so.

## II. INTERSECTION OF PROPERTY LAW AND SEXUAL ORIENTATION

Recently, the Task Force on Real Property Law School Curricula, created by the ABA Section on Real Property, Probate and Trust Law ("Task Force"), evaluated the basic property law course offered by most U.S. law schools.<sup>13</sup> The Task Force found that four topics are covered in nearly all of the schools that devote at least four credit hours to property law: adverse possession, concurrent ownership interests, servitudes, and possessory estates and future interests.<sup>14</sup> A substantial majority of the schools, greater than ninety percent, also allocate time to landlord-tenant law in the basic property law course.<sup>15</sup> Land use regulation, which typically includes topics such as nuisance, servitudes, zoning, and eminent domain, is covered by more than seventy-five percent of U.S. law schools.<sup>16</sup> Topics less likely to be addressed in a property law course include natural resources and intellectual property.<sup>17</sup>

When choosing which topics to address, property law professors, like all professors, have to make difficult choices regarding coverage. These decisions are generally made in light of institutional and course objectives. For example, at some schools, a primary concern is student bar passage rates.<sup>18</sup> Professors at these institutions may choose to resolve course coverage issues in favor of topics that are more likely to be tested on a bar exam.<sup>19</sup>

Preparation for legal practice may be the primary objective for other professors.<sup>20</sup> These professors may choose to include topics that students are likely to face as practitioners.<sup>21</sup> In fact, the Task Force was created in part to investigate and address concerns that new lawyers are not "sufficiently familiar with the essential concepts of real estate practice that had previously

13. Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in U.S. Law Schools*, PROBATE & PROP., Sept./Oct. 2007 at 36.

14. *Id.* at 37.

15. *Id.* at 38.

16. *Id.*

17. *Id.*

18. Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 69 (2007).

19. *See id.* at 111. Professor Trujillo writes:

[L]aw schools should encourage students to take and master bar courses for a grade. It should be stressed that mastery of these courses is vital to passing the bar exam. In fact, students who do poorly in these courses should be advised to lighten their course load in order to master the basics of the bar courses.

*Id.*

20. *See* Suellyn Scarnecchia, *Serving the Most Important Constituency: Our Graduates' Clients*, 36 U. TOL. L. REV. 167, 167 (2005).

21. *See id.* at 169. In this article, Dean Scarnecchia tells law schools that "[o]ur programs are a vital step in the licensing process for practicing law. All of our graduates need to be competent to practice law, whether they decide to or not." *Id.*

been learned in law schools.”<sup>22</sup> Other schools may be more focused on preparing students to think critically about legal issues in preparation for advanced courses.<sup>23</sup> Regardless, however, of a particular professor’s focus or perspective, the results of the Task Force’s study show that property law professors have numerous opportunities to integrate issues of sexual orientation into the property law course. The next few sections of this essay highlight three areas where a professor can do so.

#### A. *The Law of Leaseholds*

The law of leaseholds is the law that regulates the relationship between landlords and tenants.<sup>24</sup> The landlord’s rights when selecting tenants for residential real estate is one of the key topics in this area of the law.<sup>25</sup> Historically, landlords were free to discriminate when selecting tenants.<sup>26</sup> However, the enactment of federal, state, and local fair housing acts made illegal certain discriminatory acts on the part of landlords.<sup>27</sup>

In the section of the course devoted to the law of leaseholds, I present the students with a simple hypothetical fact pattern. In the fact pattern, the students are told that a client of the law firm where they are clerking has just purchased an unoccupied, twelve-unit apartment building. The client does not have any tenants yet, but wants to know whether a lease must be entered into with every financially qualified person who wants to rent a unit. The students are then given a list of individuals that the client does not want as tenants. The list always includes a lesbian or gay man.

The Federal Fair Housing Act is clear—sexual orientation is not a protected classification.<sup>28</sup> However, I am regularly surprised by the number of

22. Bernhardt & Martin, *supra* note 13, at 36.

23. See Press Release, Harvard Law School, HLS Faculty Unanimously Approves First-Year Curriculum Reform (Oct. 6, 2006), *available at* [http://www.law.harvard.edu/news/2006/10/06\\_curriculum.php](http://www.law.harvard.edu/news/2006/10/06_curriculum.php). For example, Harvard Law School has redesigned its first year curriculum to, among other things, provide “a foundation to enable any student who wishes to pursue an advanced Program of Study.” *Id.* The new first year curriculum devotes fewer hours to traditional first year courses such as property law and adds courses that focus on international and comparative law, legislation and regulation, and complex problem solving. *Id.*

24. See JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 437 (2d ed. 2005).

25. See generally JESSE DUKEMINIER ET AL., *PROPERTY* 376 (6th ed. 2006).

26. *Id.*

27. See *id.*

28. 42 U.S.C. § 3604 (2000). Subsection (a) provides:

it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

students who think that the landlord cannot discriminate against lesbians and gay men. The right to rent an apartment, according to some of my students, is very different from the right to marry, which they may not support for lesbians and gay men. This distinction makes it difficult for them to understand why landlords are allowed to discriminate on the basis of sexual orientation.

Discussion of the fact pattern easily segues into discussion of the policy behind the Federal Fair Housing Act, and discussion of the differences and similarities between discrimination on the basis of sexual orientation and discrimination based on the classifications protected by the Federal Fair Housing Act.<sup>29</sup> Also, because several states and many municipalities have instituted protections against housing discrimination on the basis of sexual orientation, this area provides an opportunity to review the differences between federal, state, and local laws and ordinances.<sup>30</sup>

### B. *Concurrent Ownership Interests*

“[P]roperty is [often] owned by more than one person at a time.”<sup>31</sup> In fact, many types of co-ownership, including tenancy in common, joint tenancy, and tenancy by the entirety, are recognized by modern law.<sup>32</sup> The rights and responsibilities of the co-owners depend upon the type of co-ownership that binds the co-owners together.<sup>33</sup>

In this part of the course I often read a hypothetical fact pattern to the students. The hypothetical involves two individuals who together purchase Greenacre, a piece of real property. Unfortunately, one of the two individu-

*Id.* § 3604(a). Section 3604(f)(1) makes it illegal:

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

*Id.* § 3604(f)(1).

29. *See id.*

30. SINGER, *supra* note 24, at 611. At least eleven states and 100 municipalities prohibit discrimination on the basis of sexual orientation. *Id.* This is also the perfect part of the course for a discussion about discrimination on the basis of gender identity and expression. Many states and municipalities prohibit discrimination on such grounds. *See* Transgender Law & Pol’y Inst., U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, <http://transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Mar. 18, 2008). In fact, on February 12, 2008, Broward County, Florida, the county where my law school is located, made it illegal to discriminate on the basis of gender identity and expression in housing. Scott Wyman, *Transgenders Gain Protection: Broward Expands Human Rights Ordinance to Include Gender Identity*, SUN-SENTINEL, Feb. 13, 2008, at 1B.

31. SINGER, *supra* note 24, at 352

32. JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS 419 (2004).

33. *See* SINGER, *supra* note 24, at 352–53.

als dies during the hypothetical and the students are asked to sort out the resulting ownership interests in Greenacre. This exercise requires the students to determine the type of ownership interest the two individuals acquired in the property. In the hypothetical, the two individuals are identified by name. I do not, however, provide the students with the relationship of the individuals or their gender. In my notes, the individuals are named Gene and Claude. The students, at least initially, hear “Jeanne” and Claude. They then presume that “Jeanne” and Claude are married. This provides us with a wonderful opportunity to discuss the “heterosexual presumption” that so many students bring to law school.<sup>34</sup> Students who presume that “Jeanne” and Claude are heterosexual and married erroneously apply the rules of tenancy by the entirety to the ownership of Greenacre, which is a type of ownership interest available only to married couples. This discussion also provides us with an opportunity to talk about client interviewing and avoiding the pitfall of the “heterosexual presumption” in instances where the sexual orientation of the parties may affect their legal consequences.<sup>35</sup>

Furthermore, the current edition of the casebook I use<sup>36</sup> includes *Goodridge v. Department of Public Health*,<sup>37</sup> the Massachusetts same sex marriage case. The discussion of Gene and Claude, and of the different types of concurrent ownership interests, easily leads to a discussion of the property rights that are provided to married couples and the access that same sex couples have or do not have to marriage.

### C. Land Use Controls

Both private and public land use restrictions can be imposed upon the ownership of real property. Private restrictions, such as those imposed by a developer of a residential community, typically take the form of covenants that run with the land.<sup>38</sup> Public restrictions, on the other hand, are found in

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34. See Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 109 (2000). According to Professor Carbado, “The normativity of heterosexuality requires that homosexuality be ‘specified, pointed out.’ Heterosexuality is always already presumed.” *Id.* (quoting Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDU. 47, 48 (1983)).

35. For example, an attorney in Florida who is advising a client about adoption needs to know whether the client is a lesbian or gay man because Florida law expressly prohibits homosexuals from adopting. FLA. STAT. § 63.042(3) (2007). Section 63.042(3) of the *Florida Statutes* provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” *Id.*

36. DUKEMINIER ET AL., *supra* note 25.

37. 798 N.E.2d 941 (Mass. 2003).

38. See generally SINGER, *supra* note 24, at 230.



the zoning laws adopted by local government bodies.<sup>39</sup> Both covenants and zoning ordinances can be used to restrict the use of real property to single family residential use. My casebook includes cases in both areas that require students to consider whether a collection of individuals who live together are a family.<sup>40</sup>

*Hill v. Community of Damien of Molokai*<sup>41</sup> is the case that is included in the section of the casebook devoted to covenants that run with the land.<sup>42</sup> In *Hill*, the court had to determine whether a group home for people living with AIDS and other terminal illnesses was a permitted use in Four Hills Village, a planned subdivision in Albuquerque, New Mexico.<sup>43</sup> A covenant imposed upon the homes in Four Hills Village provided in relevant part that “[n]o lot shall ever be used for any purpose other than *single family residence* purposes.”<sup>44</sup> The word “family” was not defined in the covenant.<sup>45</sup> The court rejected the claim that family members had to be related by blood or marriage<sup>46</sup> and found that the residents of the group home were a family, in part because their activities were “communal in nature” and they provided moral support and guidance for one another.<sup>47</sup>

During the zoning law portion of the course, we discuss *Village of Belle Terre v. Boraas*.<sup>48</sup> In *Boraas*, six unrelated individuals lived in a house in a village with a zoning ordinance that limited use to one-family dwellings.<sup>49</sup> The zoning ordinance defined a “family” as

[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.<sup>50</sup>

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39. See *id.* at 637.

40. See generally *DUKEMINIER ET AL.*, *supra* note 25.

41. 911 P.2d 861 (N.M. 1996).

42. *DUKEMINIER ET AL.*, *supra* note 25, at 773.

43. *Hill*, 911 P.2d at 864.

44. *Id.* at 865.

45. *Id.* at 867.

46. *Id.*

47. *Id.* at 869.

48. 416 U.S. 1 (1974).

49. *Id.* at 2–3.

50. *Id.* at 2.

The Court was asked to determine whether the ordinance's definition of family was constitutional.<sup>51</sup> The Court found that it was, and that the Village of Belle Terre could determine that no more than two unrelated individuals constituted a family.<sup>52</sup>

The two cases discussed above, plus the notes in my casebook that follow *Village of Belle Terre*,<sup>53</sup> open the door for discussion of hypothetical fact patterns involving blended families. A blended family that consists of a man, his biological children, a woman, her biological children, and the biological child of both the man and woman who are married to each other, is readily recognized as a family. However, when the collection of individuals is a woman, her biological children, her lesbian partner, and her partner's biological children, they may not be recognized as a family, at least according to traditional definitions of family. Discussing the hypothetical blended families after the class has discussed the nuts and bolts of covenants that run with the land and zoning ordinances provides an opportunity to talk about the intersection of sexual orientation and property law. The fact patterns raise issues about how zoning ordinances and covenants may disadvantage families where the adults are same sex partners. The fact patterns also encourage discussion about whether the law should be able to overrule the decision of a group of individuals to consider themselves a family. Additionally, the fact patterns raise issues about contract interpretation—what did the parties intend for the covenant to mean?—and legislative intent—what did the legislative body that enacted the zoning ordinance intend?

### III. PREPARATION FOR INCLUDING SEXUAL ORIENTATION ISSUES IN THE PROPERTY LAW COURSE

Once a professor has decided to include issues relating to sexual orientation in her property law course, she must determine how to do so. The next few sections of this essay discuss some of the issues she must consider as she prepares her course.

#### A. Considerations

One consideration regards the text selected by the professor to teach the course.<sup>54</sup> Presumably, the text allows the professor to teach the substantive

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51. *See id.* at 3.

52. *Id.* at 3, 8–9.

53. DUKEMINIER ET AL., *supra* note 25, at 908–11.

54. *See generally* Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC. 557 (1995).

areas she considers most important. Additionally, the professor must consider whether it contains materials that will assist in the discussion of issues of sexual orientation. If it does, are the issues contained in the major cases, or in the notes that follow the cases? If the preferred text does not contain material that allows the professor to discuss property law issues that relate to sexual orientation, should she choose a different text or prepare a supplement or handouts that contain such material?

After the professor has resolved the issues regarding the materials she will use, she must also decide whether she will share personal stories or anecdotal accounts of incidents involving the intersection of property law and sexual orientation. Personal stories and narratives are often very powerful ways of making the law come alive for law students.<sup>55</sup>

The professor must also think carefully about how to involve students in the discussions.<sup>56</sup> These discussions may engage students in ways that other property law topics may not, which can lead to some very robust discussions of the material. Many students, however, do not know how to talk about the issues, especially in a legal context—something the professor must consider when determining how to conduct the class. The topic may also make some students uncomfortable and less willing to participate during class. Students may also raise religious, political, and personal concerns during the discussions, and the professor must decide how she will determine what is relevant to the class discussion and how to keep the students focused.<sup>57</sup>

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55. See, e.g., Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 953–54 (2006). Professor Barnes writes, “[i]t is also squarely within the tradition of feminist and critical legal scholars to use narrative to expose discrimination and illuminate how the law often fails to account for the voices of outsiders.” *Id.*

56. See Curtis Nyquist et. al, *Using Students as Discussion Leaders on Sexual Orientation and Gender Identity Issues in First-Year Courses*, 49 J. LEGAL EDUC. 535, 535 (1999). The authors discuss how Professor Nyquist used upper-level law students to integrate issues of sexual orientation into his first year contracts class. *Id.* at 536. Initially, Professor Nyquist intended only to bring comments from the members of his school’s lesbian, gay, bisexual, and transgender student group into the classroom. *Id.* However, he ultimately decided to bring two members of the group to his class to discuss sexual orientation issues in one of the cases he covered. *Id.* The authors noted that the participation of the upper-level students in the class “empower[ed] the [upper-level] students [who taught] the class [and] encourage[d] dialog [about LGBT issues] between students and faculty.” *Id.* at 544.

57. See Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 558 (1996).

The professor must also be prepared to deal with any discomfort she may feel when teaching the course.<sup>58</sup> Teaching issues of sexual orientation is not the same as teaching, say, the rule against perpetuities. While the professor may feel strongly about “dead hand control,” the rule is unlikely to raise the personal, religious, and political issues that sexual orientation issues may raise. When preparing the course, the professor should be clear about her positions and what, if any, bearing they will have on the class discussions.<sup>59</sup>

Perhaps most importantly, the professor must think about how to ensure that the class is ready to discuss issues that are related to sexual orientation.<sup>60</sup> Because we have gay, lesbian and bisexual students in our classes, discussions about sexual orientation may affect them personally. Therefore, as professors, we have to make sure that students, regardless of their personal opinions, will treat the discussions with respect. Worse than not including these issues in a property law course is to include them in a way that leaves students feeling vulnerable or under attack. Additionally, the professor must remember that she is teaching property law, a required course often taught to first year law students, and not an upper-class elective course that students have chosen to take.<sup>61</sup> Thus, the students’ familiarity with, and exposure to, the issues is unknown to the professor. This calls for careful thought about how to present the material and engage students in the conversation.

The professor who decides to include these issues in her course must realize that she takes a risk that the course may be criticized by colleagues,

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58. *Id.* Professor Dark notes that the professor’s own feelings of vulnerability on these issues may make it difficult for the professor to have these kinds of discussions with her class. *Id.* at 559.

59. See, e.g., Angela Mae Kupenda, *On Teaching Constitutional Law When My Race Is in Their Face*, 21 *LAW & INEQ.* 215, 216–17 (2003). In this piece, Professor Kupenda writes movingly about teaching constitutional law after September 11, 2001. *Id.*

I knew that if I initiated the discussion, I would have to be true to myself. That meant I would have to facilitate a discussion of terror in a broader sense which would include the terror many racial minorities, and their ancestors, have experienced, and still do experience, even in America. The terror of slavery and continuing hate crimes would have to be addressed. Whether our country is ready to address all terror, or whether the racist terror of some groups will continue to be considered protected speech would have to be posed for discussion. Would not it? These topics were being discussed in many people of color circles, surely my overwhelmingly white class of future lawyers should be challenged to think more broadly.

*Id.*

60. See Dark, *supra* note 57, at 559–60. Professor Dark insightfully notes that it is crucial that a professor “pay attention to his or her relationships with individual students and the class.” *Id.* According to Professor Dark, “[i]nvesting time and energy into developing a solid, respectful, and approachable relationship with the students in the classroom will put the teacher in the best position to” ensure a supportive classroom environment. *Id.*

61. See Nyquist et al., *supra* note 56, at 544. “Issues of diversity are too important to be discussed only in Constitutional Law and upper-level specialty courses. They need to be part of the first-year curriculum.” *Id.*

deans, or students.<sup>62</sup> Property professors, especially those who teach at schools that have reduced the number of credit hours dedicated to property law, may have already made choices that eliminated or reduced coverage of topics that many may consider fundamental. Adding issues of sexual orientation to the course may subject the professor to the criticism that she is wasting time on issues that are not central to property law.<sup>63</sup> Forewarned is forearmed.

### B. *One Professor's Approach*

While not ignoring the ways in which issues of sexual orientation are different than other property law issues, I make every effort to treat them the same as I treat all of the other issues I introduce in class. My text allows me to discuss these issues with my students, so I have not prepared any additional written materials for the course. Using the text as a starting point, I present the students with hypothetical fact patterns where the sexual orientation of the parties is relevant. Because I regularly give my students hypothetical fact patterns to analyze, they do not consider it unusual when I do so in this context. Additionally, I try not to interrupt the pedagogical flow, or in any other way signal to the students that we are about to discuss something unconventional or nontraditional, when the fact patterns involve gay men or lesbians.

I am also careful not to introduce issues of sexual orientation when they are not relevant to the discussion. My goal is to show the different impact the law may have on persons who are gay, lesbian or bisexual. When the legal consequences do not change based on sexual orientation, there is no reason to make an issue of sexual orientation. This does not mean, however, that I may not have a hypothetical where some of the parties, at least in my mind, are gay and lesbian. It just means that I do not, for example, indicate whether the finder of lost property is a gay man or lesbian.<sup>64</sup> I am also no

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62. See Dark, *supra* note 57, at 558. Professor Dark notes that professors who include issues of diversity in their classes may face claims that the issues are irrelevant or that they introduce "impermissible bias and subjectivity into an otherwise objective, neutral, and reasoned discussion of the law." *Id.*

63. See generally Bernhardt & Martin, *supra* note 13 (focusing on the variety of subject matter that can be taught in a basic property law class, and examining which topics are the most relevant and popular among ABA accredited law schools). See also Dark, *supra* note 57, at 557–58.

64. In this way, I am similar to J.K. Rowling, the author of the incredibly successful Harry Potter books. After completing the last book, Ms. Rowling revealed a fact not included in any of the books: Dumbledore, Harry's mentor and the headmaster of Hogwarts, was gay. Greg Toppo, 'Harry Potter' Author: Dumbledore is Gay, USA TODAY, Oct. 20, 2007, avail-

more likely to share personal stories with respect to this area of the law, than in any other part of the course. I am always, however, on the lookout for narratives and news stories that will enrich the classroom discussion in all areas of the course.

When issues involving sexual orientation come up during the course, I expect that students will participate as they do in all other parts of the course. No student gets a pass, although I recognize and I make subtle accommodations, including exercising more control over the discussion because of the ways in which the discussion affects some students personally. I may also budget extra time for discussion because it may be the first time an issue has resonated personally for some students. Additionally, I may spend additional time after class or in my office continuing the conversation.

I make sure the class is ready to have these discussions by always treating my students with respect and requiring them to treat me and their classmates likewise. My goal is to create an environment where they are not intimidated to participate, so long as they are doing so in thoughtful and respectful ways.

#### IV. IMPORTANCE OF INCLUDING SEXUAL ORIENTATION ISSUES IN THE LAW SCHOOL CLASSROOM

We owe it to our students to include discussions of sexual orientation in our courses. A property law course is not complete if students are not required to think about these issues. Property law is a “[c]ourse introducing rights and interests in both real and personal property.”<sup>65</sup> If students have not been required to think about whether a person’s property rights and interests are affected by that person’s sexual orientation, then they have not been given the opportunity to think about one of the fundamental issues underlying property law. Additionally, the isolation and invisibility that lesbian, gay and bisexual students often feel in law school will be lessened if they feel that an integral part of who they are is not ignored by, or irrelevant to, the law school experience, especially if they have personally experienced discrimination based on their sexual orientation.<sup>66</sup> Of course, if the issues are discussed in ways that validate the discrimination and increase the margin-

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able at [http://www.usatoday.com/life/books/2007-10-20-potter-dumbledore\\_N.htm](http://www.usatoday.com/life/books/2007-10-20-potter-dumbledore_N.htm). According to Ms. Rowling, “I always saw Dumbledore as gay.” *Id.*

65. Nova Southeastern University, Shepard Broad Law Center, Course Descriptions, [http://www.nsulaw.nova.edu/students/current/course\\_descriptions.cfm?sort=txtTitle](http://www.nsulaw.nova.edu/students/current/course_descriptions.cfm?sort=txtTitle) (last visited Feb. 17, 2008). This is the first part of the description of the property law course at the law school where I teach.

66. See Nyquist et al., *supra* note 56, at 544.

alization faced by lesbian, gay and bisexual students, they should not be brought into the classroom.

Furthermore, by incorporating these discussions into the course, we provide a benefit to the public.<sup>67</sup> Our students will not always be law students. After they graduate, they will become practicing attorneys, legislators, judges, and other community leaders. They will have clients and constituents who are gay, lesbian and bisexual. Parties who appear before them will be gay, lesbian and bisexual. Those who are making decisions and policies that affect the lives, liberty, and property of others should be informed about the different impact those decisions and policies may have on others because they are gay, lesbian or bisexual.

## V. CONCLUSION

While there are risks to including these issues in a property law course, they are greatly outweighed by the benefits. Issues of sexual orientation should not be omitted from a basic property law course even if they are not included in the textbook. Encouraging students to think about traditional topics such as concurrent ownership interests, in nontraditional ways—what if the co-owners are a same sex couple?—enriches the property course in a way that benefits both the students and the professor. Discovering areas where property law intersects with issues of sexual orientation often leads to rewarding exchanges between the professor and her class. This essay focuses on property law because that is the course I teach most frequently, but professors of other subjects should also consider whether similar discussions can be incorporated into their courses.

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67. See Dark, *supra* note 57, at 542.

Discussion of diversity issues is relevant, important, challenging, and often rewarding. Those discussions belong in law schools and, at the very least, in law school classrooms. Diversity issues affect and shape legal doctrine, application of the law, and judicial and administrative processes. Consequently, students who will practice law into the next century need to be conversant with and understand the nuanced ways in which these issues affect what they will do as lawyers.

*Id.*